United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1032

B
P/S

To be argued by
WILLIAM J. STUTMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CLIFFORD ZIEGLER,
Defendant-Appellant.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT

WILLIAM J. STUTMAN
Attorney for Defendant-
Appellant
233 Spring Street
New York, N. Y. 10013
255-5170

TABLE OF CONTENTS

TABLE OF AUTHORITIES
(cases)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

THE UNITED STATES OF AMERICA,

Appellee,

-against-

CLIFFORD ZIEGLER,

Defendant-Appellant.

PRELIMINARY STATEMENT

Appellant, Clifford Ziegler, appeals to this Court from a judgment of the United States District Court for the Eastern District of New York (Platt, J.), entered January 9, 1976, which sentenced him, after a jury trial, to concurrent terms of imprisonment of eight years, upon his convictiion of the crimes of possession and distribution of a narcotic drug controlled substance. By order of this Court dated February 9, 1976, William J. Stutman, Esq., was assigned to prosecute this appeal on Ziegler's behalf under the Criminal Justice Act. It was further ordered that appellant be permitted to file eight xerox copies of the brief.

ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain appellant's conviction?

2. Whether appellant was denied a fair trial by the district court's refusal to charge the jury with respect to the defense of entrapment?

STATEMENT OF THE CASE

Appellant was indicted on two counts: (1) possession of (approximately 47.17 grams of heroin) a narcotic drug controlled substance, and (2) knowingly and intentionally distributing the drug.

At his trial, all the testimony was given by four special agents of the Department of Justice's Drug Enforcement Administration: one of the agents dealt directly with Ziegler while the other three were involved in various aspects of initiating the transaction, inducing appellant to enter into the transaction, and in keeping him under surveillance.

ROBERT P. JONES was the case agent who was responsible for this matter (137*). He had arrested one David Livingston for trafficking in narcotics in 1972. As a result of this arrest Livingston, just like a "large majority" of other informants, had been recruited to be an informant for the government (139, 181). On October 3, 1973, Livingston informed Jones that he knew appellant, a distant relative (146), "was trafficking in heroin and that he would be able to introduce an agent to Ziegler" to make a purchase from him (140). As of that date, the charges on the informant's 1972 arrest were still pending (140), and, as a result of his help in putting the government in contact with appel-

---

* References are to trial minutes

lant, the DEA would later write a letter to the United States Attorney's office which was presented in his behalf at the time of the disposition of his case (193).

When Livingston brought up Ziegler's name, agent Jones had checked the Administration's files for possible data on appellant, but had obtained a negative result (147). Nevertheless, he apparently adopted Livingston's suggestion, for Jones had Livingston meet with fellow agent GARFIELD HAMMONDS on the same day (19, 53), and gave Hammonds $2,800 to buy narcotics (186).

Hammonds then drove Livingston in his two seater Triumph convertible sportscar to 347 Sumner Avenue in Brooklyn, a store front-after hours spot. Livingston unlocked the door and they went inside (56). He then left the agent alone inside the bar and came back several minutes later with appellant and another (unidentified) black male. The agent did not know either Zeigler or the other man (60-1). Livingston went behind the bar and the agent sat down in the middle of Ziegler and the other man (38, 63). While the informant introduced the witness to appellant, the agent does not remember being introduced to the other man, nor did he converse with him (64, 94). Hammonds did talk with Ziegler and heard appellant talk to the other man about "just basic general conversation; it wasn't concerning the narcotics transaction" (38-9). This man was about 6' 1" tall and had a "very slim build"--he was very skinny (22, 38, 96).

Ziegler asked the agent what he could do for him, from which innocuous remark Hammonds "deduced" that this was a reference to ob-

taining heroin for him (65). The agent therefore suggested that he was interested in purchasing two ounces of heroin, to which appellant allegedly replied that for $2,800 he could furnish such a quantity (20). The three of them then left the bar together, with appellant and the agent going to the latter's vehicle and the unknown black male walking up the street (23).

They then drove to Tompkins and Macon Street and parked in front of 203 Macon. Appellant got out of the car, allegedly informing the agent that he could not take him to his source of supply. Hammonds gave him $2,800, but Ziegler returned the money later that night when he could not locate his source, who had gone into the "Borough of Manhattan" (27-29, 71). During this time the agent did not know the whereabouts of Livingston (69).

Summarizing the activities of the night of October 3, 1973, not only did Ziegler not give agent Hammonds any drugs but the agent did not see him with any heroin nor did any drug transaction take place (71, 75). These facts were confirmed by agent Jones, who was on surveillance (148).

Two nights later, Hammonds again met with appellant and the informant at Livingston's bar and again negotiated for defendant to sell him heroin (30-1). The agent then left with appellant and gave him $2,800 for the second time. Ziegler left him parked on the street (32-3), and never returned (33). However, after waiting in excess of two hours, Hammonds observed an unidentified black male whom he claimed was the same person he had seen with Ziegler two nights earlier, but now

accompanied by a black female, approach his car (33). The man tapped on the car window and allegedly said that "Chuck had sent him with the package" (42). (At the grand jury, the witness had testified that this man said, "Ziegler sent it"--82-3.) Defense counsel objected to the introduction of this statement on the ground that it was hearsay, particularly since (a) the government never produced this man as a witness at trial (79) and (b) the agent had previously testified that he had only heard Ziegler talking to him two nights earlier about general matters, not drugs (38-9)! However, the court overruled this objection, apparently agreeing with the government's contention that the man was an unindicted co-conspirator (41).

In any event, the unidentified man got into the car, where he remained for 5-10 minutes, during which time he took a brown paper bag from his pocket and handed it to the agent (42, 79). Inside the bag Hammonds saw a beige whitish powder which he later tested to be heroin (43, 45). Even though the agent knew that this man had committed a crime, he let him out of the car and did not follow him or the female, who had remained outside the car throughout (45, 79). The female was about 5'7" with a slim build and wore red high-heeled shoes and some other "loud" color (95-6). Hammonds never saw the man or woman again nor for that matter has he ever seen Livingston (98-9).

Two other agents who had been part of the surveillance team the night of October 5, 1973, EDMUND C. LASHER (104-113) and GERALD CARR (114-30) also testified that they had seen the unknown male and female. One, however did not notice her red shoes (130) (the other

did not testify about this) while they both agreed that, contrary to agent Hammonds' characterization of the male as being very tall and very skinny, he was of medium build and height (113, 119). In fact, Carr admitted that this vague, general description could apply to at least "16 million blacks" (120). Nevertheless, both agents had seen appellant with the male and female that night (111, 117), as had agent Jones (136). However, none of the agents could see or hear what had allegedly transpired inside Hammonds' vehicle--i.e., they had not seen any narcotics pass nor had they ever seen appellant or the male or female either with the $2,800 in cash or with any drugs (130, 152, 155).

Finally, while Jones conceded that the informant Livingston had been his only lead to appellant, he was unable to locate him to testify at the trial nor had he looked for the male nor female (183-4).

POINT I
The evidence was insufficient
to sustain appellant's conviction

Appellant was convicted of both possession and distribution of heroin. As to possession, none of the government's witnesses ever saw him with the drug--in fact, they admitted that he never had any, the only inculpatory testimony being that an unidentified black male, who an agent claimed to have previously seen with Ziegler, later approached the witness with a package from "Chuck" or "Ziegler". Put another way, the government apparently argues that appellant had "constructive" possession. Several comments must be made about the foregoing testimony.

(1) Hammonds, the agent who had allegedly seen this stranger two nights previously, admitted that he never was introduced to him; (2) the agent never spoke with him before receiving the package; (3) Hammonds allegedly overheard the man and appellant talking, but admitted that their conversation was of a general nature and had nothing to do with trafficking in drugs; (4) Hammonds' description of this man--that he was very tall and very skinny, was completely different from that of the agents who had the man under surveillance--they thought him to be of medium or heavy height and build; (5) the agents' description could have fit "16 million blacks"; (6) Hammonds gave two different names for appellant before the grand jury and at the trial; (7) although Hammonds noticed red shoes and a loud color on the man's female companion, his fellow agents did not; (8) Hammonds let the man leave his presence, although conceding that he had committed a crime; and (9) nei-

ther the male nor the female were ever produced at the trial. In short, appellant's "possession" was so tenuous--only stemming from his alleged acquaintance with the stranger--that it was no possession at all, not even "constructive".

(Incidentally, in view of the several factors above specified dealing with the unidentified man, it was prejudicially erroneous for the district court to have allowed this person's alleged statement to the agent to have been testified to by the agent (41).)

The only thing of which appellant had possession, apparently, was $2,800 of the government's money on October 2, 1973, which he returned to the donating agent but was cajoled into re-accepting two nights later. But possession of such funds does not make him guilty of being a distributor or seller of heroin.

Appellant did not even have a file with the DEA until a folder was opened in his name because of the suggestion to the government by the informant, Livingston, that he, Livingston, could introduce an agent to him. This information was highly suspect at best because the informant, hoping that he would receive favorable consideration on his own pending narcotic arrest in exchange for his data, was willing to go so far as to turn one of his own relatives over to the government. This hope was to later bear fruition when the government did write a letter on his behalf in connection with the disposition of his case.

Nevertheless, and with this alleged knowledge, Jones, the agent in charge, gave his colleague, Hammonds, $2,800 of taxpayers money with which to make a "buy".

The informant then proceeded to introduce Hammonds to Ziegler, and the agent claimed that from appellant's simple salutation, made during the course of but a mere 1-2 minute conversation (98), he was able to "deduce" that Ziegler was a dealer in heroin. Perhaps this was because the area was known to be heavy in narcotics traffic (146, 124). However, regardless of whatever harmless and friendly intent Ziegler may have had in greeting the agent, Hammonds immediately dissipated such innocence by suggesting that he was interested in purchasing heroin and by giving him $2,800 to obtain (buy?) same.

Ziegler was unable to help him, returning the $2,800. Hammonds testified that this was due to the fact that appellant's source was unavailable, being in the "Borough of Manhattan". It is unworthy of belief that such a phrase would actually have been uttered by Ziegler. In any event, the agent was apparently not satisfied with his failure to put Ziegler on the spot so he returned two nights later and again asked him to find some heroin. Ziegler's response was to disappear from the scene, the aforementioned unidentified male then purportedly providing the heroin for Hammonds. In other words, "Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller. For this reason the conviction cannot be sustained." United States v. Moses, 220 F. 2d 166, 168 (3rd. Cir. 1955). There is nothing in the record to indicate that Zeigler was aiding and abetting the man to commit a crime, it having been already been pointed out, for example, that appellant and that person had only engaged in general conversation in the agent's presence, despite Hammond's active solicitation of Zeigler

to commit a crime for him. Appellant did not associate himself with the unknown man's venture; did not participate in it as something that he wished brought about; nor did he seek by his action to make it succeed. Cf. Nye & Nissen v. United States, 336 U.S. 613, 619 (1939), quoting from United States v. Peoni, 100 F 2d. 401, 402 (2d Cir. 1938).

The foregoing makes it clear that the government failed to meet its burden of proving appellant guilty beyond a reasonable doubt.

POINT II
The District Court should have charged the defense of entrapment

In point I discussion has been had of: the government's conduct in using an informant to help in soliciting appellant to commit a crime which his negative file indicated he was not predisposed to do; of the government's enticing Ziegler with $2,800 in cash; the government agent's unfounded deduction that appellant was in a position to locate drugs for him; the agent's returning to appellant after Ziegler was unable to find anything for him and urging him to try again for a second time; and of the government's failure to produce the mysterious unidentified male, the actual producer of the heroin, at trial. In spite of this evidence, the district court rejected defense counsel's request that the court charge the defense of entrapment. The issue, therefore, boils down to whether the case at bar is more closely analogous to the potential entrapment found in this Court's recent decision

in United States v. Anglada, 524 F. 2d 296, or to the non-entrapment found in United States v. Licursi, 525 F. 2d 1164, the companion case.

In deciding whether to charge entrapment the district court had to consider the evidence in a light most favorable to appellant. United States v. Dehar, 388 F. 2d 430, 433 (2d Cir. 1968). Here appellant as Anglada, had no prior record; he was not "fully prepared to complete (the) transaction) on the very first occasion, as in United States v. Miley, 513 F. 2d 1191 (2d Cir. 1975); he did not "grasp at the opportunity" to deal, as in United States v. Greenberg, 444 F. 2d 369 (2d Cir.) cert. den. 404 U.S. 853 (1971), since he did nothing for agent Hammonds on the first night and disappeared on the second without giving him anything; nor was Ziegler willing to supply heroin "in large quantity", as in United States v. Nieves, 451 F.2d 836 (2d Cir. 1971). Concerning appellant's alleged search for a source of supply and lack of hesitation in going through with the deal, in light of the foregoing factors, "to the entent that this evidence implied propensity," it merely suggested arguments the government should have been required to make to the jury after the district judge first charged entrapment. Anglada, supra, 524 F. 2d at 299. Moreover, contrary to Licursi's actions, it was not appellant herein but the agent (and quite possibly the informant) who reassured him and coaxed him to go on after Ziegler was unable to help him.

Examined from the twofold standard enunciated in United States v. Riley, 363 F2d. 955 (2d Cir. 1966), there can be no argument that Hammonds did in fact induce appellant to attempt to furnish drugs for

him--by interpreting his innocous greeting as an invitation to deal; by giving him $2,800, and by encouraging him to go to his source, even after appellant told him that he could not locate the supplier. In other words, Ziegler met his"relatively slight" burden of showing inducement by the government. United States v. Henry, 417 F2d. 267, 269 (2d Cir.1969), cert. den. 397 U.S. 953 (1970). And there is nothing in the record to demonstrate that the government had met the second standard of showing by substantial evidence that Ziegler (without a prior record) had a predisposition to commit the crime in question. Greenberg, supra. Again, unlike Licursi, appellant had to be persuaded by the government agent to look for a source; was unable to locate such source; and discovered that the government agent would then return to him and insist that he find a source. Clearly, therefore, any pressure and persuasion came from the government, and appellant did not readily play his part. Cf. Licursi, supra, at 1169.

In summary, since the evidence adduced demonstrated that the government induced appellant to search for a source of heroin and that appellant had no predisposition to commit the crime, this case is analogous to Anglada. The district court commited error in refusing to charge entrapment.

CONCLUSION
The judgment of conviction should
be reversed and the indictment dismissed

March 12, 1976

Respectfully submitted,
WILLIAM J. STUTMAN
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

-against-

AFFIDAVIT OF SERVICE

CLIFFORD ZIEGLER,

Defendant-
Appellant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

LESLEE NYMAN, being duly sworn, deposes and says:

that she is not a party to this action, is over 18 years of age and resides at New York, N. Y.; that on March 1[illegible], 1976, she served the annexed brief and appendix upon Hon. DAVID G. TRAGER, United States Attorney, Eastern District of New York, Attorney for Appellee, at 225 Cadman Plaza East Brooklyn, New York 11201, the address designated by said United States Attorney for that purpose by depositing true copies of same, enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Leslee Nyman
LESLEE NYMAN

Sworn to before me this
1[illegible]th day of March, 1976

William J. Stutman
Notary Public

WILLIAM J. STUTMAN
NOTARY PUBLIC, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 19[illegible]